

BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

In re: MILK IN THE NEW ENGLAND)
AND OTHER MARKETING AREAS,)
HEARING TO CONSIDER POSSIBLE) Docket No. A0-14-A64, etc.;
CHANGES IN THE FEDERAL MILK) DA-90-017
MARKETING PROGRAM)

REPLY BRIEF OF THE DEPARTMENT OF JUSTICE

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REPLY BRIEF OF THE DEPARTMENT OF JUSTICE

The United States Department of Justice ("Department") respectfully submits this brief in reply to arguments raised in the various parties' post-hearing submissions. No party, however, has presented any facts or proffered any argument to undermine the conclusion that the Secretary of the Department of Agriculture ("USDA") can and should adopt proposals to (1) terminate the down allocation and compensatory payment provisions that effectively ban use of reconstituted milk; (2) eliminate or significantly reduce the distance differentials; and (3) eliminate or significantly reduce the Grade A differential.

Moving decisively toward a free market, rather than perpetually re-engineering the current regulatory scheme to compensate for its shortcomings and misincentives, is the most effective way to make milk marketing more efficient and to improve the welfare of American consumers.

I. The Secretary Has The Authority To Make Broad National Changes In Marketing Orders

The AMAA vests in the Secretary broad powers to make changes in marketing orders when such changes are necessary to effectuate the policy of the statute. Indeed, the Act expressly provides that the Secretary shall terminate or suspend operation of an order or a provision of an order if the Secretary finds that the order or provision "obstructs or does not tend to effectuate the declared policy of this chapter." 7 U.S.C. § 608c16(A). Nonetheless, an argument appears to have been proffered that adoption of some of the more substantive reform proposals -- where differentials are flattened or eliminated -- are beyond the scope of the powers of the Secretary of Agriculture and solely within the jurisdiction of Congress.^{1/} No legal authority is offered in support of this argument, and none exists. There are no legal barriers to the necessary reforms that have been proposed by the Department of Justice once the Secretary determines that the subject provisions do not tend to effectuate the AMAA.

The record in these hearings demonstrates that down allocation and compensatory payment provisions, and the distance

^{1/} Post Hearing Brief, Proposed Findings and Conclusions on Behalf of CONE at 8-9.

and Grade A differentials, should be terminated since they are provisions that no longer effectuate the policies of the AMAA. Rather than help to assure an adequate supply of Grade A milk for the fluid market -- identified by virtually all participants in the hearing as the AMAA's primary purpose^{2/} -- these provisions keep milk prices unnecessarily high and prevent reconstituted milk, a lower-cost fluid milk option, from reaching consumers in regions suffering from fluid milk deficits. These provisions obstruct the goals of the AMMA and should be removed.

II. Use of Reconstituted Milk Effectively Would Address the Very Concerns Raised By Other Parties

The use of reconstituted milk would allow deficit markets to secure supply at reasonable prices and would provide the most efficient way to smooth out seasonal variations. Nevertheless, some parties who oppose changes in the down allocation and compensatory payment provisions, which would allow consumers to choose reconstituted milk, raise the very concerns that would be addressed by removing these government-imposed penalties on its use. They argue that current regulation, as pervasive as it is,

^{2/} See e.g., Brief of Southern Coalition of Dairy Farmers ("Southern Coalition Brief") at 26; CONE Brief at 11; Brief and Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Anderson-Erickson Dairy Company ("Anderson-Erickson Brief") at 11; Brief and Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Marigold Foods, Inc. ("Marigold Brief") at 10.

nonetheless fails because Southern markets in particular are not getting enough fluid milk -- either from their own production or from northern sources -- at reasonable prices. Claims also have been made that the seasonal variations in milk production that exist under current regulation are disruptive. Compounding the current regulatory intervention is a poor answer -- the concerns of deficit markets cry out for market solutions.

As a first step towards market-oriented milk marketing, the availability of reconstituted milk would offer the milk industry and consumers significant benefits. Milk produced in low-cost regions could be cheaply shipped to Southern regions, or any regions, where deficits occur. Powder can also be stored, to be reconstituted when needed, thus assuring deficit regions a stable, year-round, source of supply. Finally, in addition to enhancing industry efficiency, the availability of reconstituted milk likely would provide consumers with an important, lower-cost option.

Obtaining enough milk for fluid markets is claimed to be a particular problem in the southeast.^{3/} It is ironic that some parties who complain that the order system "has failed to

^{3/} Anderson-Erickson Brief at 19; Southern Coalition Brief at 47.

attract [a sufficient supply of fluid milk] to the fluid market . . . " overlook the availability of reconstituted milk as an effective solution to concerns raised in their briefs.^{4/} Instead, they seek additional or redesigned regulation. The Upper Midwest Coalition proposed an overhaul of the Class I pricing system to redress these concerns and "promote efficiency . . . [in] the marketplace."^{5/} They seek through costly regulation to achieve some of the marketing patterns that in a freer market would occur naturally. The Southern Coalition wants to maintain the current order system at the expense of consumers, although conceding that the high government-imposed Class I prices in the south have not been sufficient to overcome the regulatory disincentives to bringing northern milk to these deficit areas.^{6/} Even the Southern Coalition admitted that a "geographic shift of production from south to north" would have

^{4/} Anderson-Erickson Brief at 11, 18-22; Marigold Brief at 10, 17-21. Anderson-Erickson and Marigold propose increasing some Class I prices and institution of transportation credits to promote fluid use of milk. Anderson-Erickson Brief at 22-24; Marigold Brief at 21-23.

^{5/} Preliminary Statement and Proposed Findings of Fact, Conclusions of Law and Supporting Brief on Behalf of the Upper Midwest Federal Order Coalition ("Upper Midwest Coalition Brief") at 3; 38-47. The Upper Midwest Coalition correctly states that shipping concentrated milk would promote efficiency and lead to substantial savings. Upper Midwest Coalition Brief at 125-130. However, they completely ignore the even greater benefits that use of dry milk powder would achieve.

^{6/} Southern Coalition Brief at 47.

a "redeeming economic feature" if it allowed the "over supply of milk in the north [to] be more readily available to meet the deficit needs to the south at more reasonable prices."7/ That is precisely what use of reconstituted milk could do: allow bountiful northern milk -- in the form of concentrate or powder -- viably to be shipped when and where it is needed.

Permitting the industry to use reconstituted milk would also effectively solve the problems caused by milk's seasonal production and demand patterns, discussed at length by a number of parties.8/ Instead of instituting yet another layer of regulation in the form of a "seasonal incentive plan", the USDA should allow the industry to take advantage of an efficient, market oriented way to smooth out seasonal supply and demand variations: let milk be made into powder during the spring flush to be reconstituted into much needed fluid milk in the fall.9/

7/ Southern Coalition Brief at 66.

8/ Brief of United States Cheesemakers, et al. ("Cheesemakers Brief") at 7-10; Southern Coalition Brief at 30-36.

9/ The Southern Coalition argues that the "seasonal fluctuations in [milk] supply and demand are not susceptible to solutions available in other industries" because "raw milk is perishable". Southern Coalition Brief at 31. The opposite is true. Post Hearing Brief of the Department of Justice at 13-16. When milk is made into powder, it is no longer perishable and can be stored for extended periods.

There are significant benefits to be gained from removing the regulatory impediments to the use of reconstituted milk. These include less costly transportation of bulk milk, less balancing costs, more efficient use of industry capacity (with less capacity required in deficit regions), less volatility in raw milk prices, and less costs to the government for purchases of surplus dairy products under the dairy price support program.^{10/} Most importantly, the industry would enjoy lower production costs from shifting production to lower-cost regions, and consumers would gain the option of a lower-cost milk product.

III. The Right of the Department of Justice Fully to Participate in These Proceedings Is Beyond Reasonable Dispute

Absent a theoretical and factual basis to confront the reform proposals advanced by the Department of Justice, opponents once again seek as an alternative to bar the Department's participation in these proceedings. Parties repeatedly have sought to exclude the Department, and have been repeatedly rebuffed.

^{10/} See Cheesemakers Brief at 9, discussing the benefits to be gained from smoothing out milk's seasonal production and demand patterns.

No new legal contention has been raised in the posthearing briefs. The parties' desire to exclude the Department should be recognized for what it is -- a desperate attempt to silence substantive criticism of the inefficiency and cost to consumers produced by the current system. On four separate occasions -- September 19, 1990, September 28, 1990, November 14, 1990, and March 28, 1991, -- the Administrator ordered that the Department of Justice be allowed to participate fully in this proceeding. Addressing on March 28, 1991, yet another version of the same issue, the Administrator ordered that the Department is a party and that "the testimony of Dr. Kimmel and Exhibit 211 [proffered by the Department] may be addressed in any and all briefs filed in this rulemaking proceeding."

CONCLUSION

The Department urges the USDA to adopt the proposals described more fully in its Post Hearing Brief. The down allocation and compensatory payment provisions should be removed so that reconstituted milk can be made available. Use of reconstituted milk would efficiently solve the very problems that marketing orders were designed to remedy. It would lower industry costs, promote market stability and assure an adequate supply of fluid milk. The USDA should also eliminate or lower significantly the distance differentials and the Grade A differential. Differentials that are now too high encourage

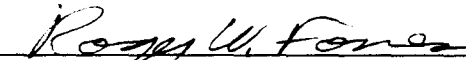
excess and inefficient production of all milk, and in particular of Grade A milk. Moreover, high regulated prices, coupled with the effective ban on reconstituted milk, force consumers to pay more for milk than they would pay in a free market, and deny them an important choice. Adoption of the Department's proposals would substantially improve efficiency in the dairy industry and provide significant benefits to consumers.

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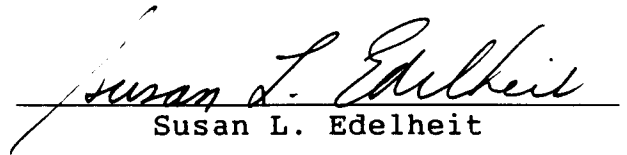

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CERTIFICATE OF SERVICE

I hereby certify that this 14th day of May, 1991, a copy of the foregoing Reply Brief of the Department of Justice was served, by first class mail, postage prepaid, upon all parties on the attached service list of this proceeding.


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